Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2039

VICTOR CASASSA,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RONALD P. FISCHETTI
Counsel for Petitioner
1290 Avenue of the Americas
New York, New York 10104
212/586-3732

ANNE C. FEIGUS
On the Brief

June 25, 1980

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In the

Supreme Court of the United States

October Term, 1980

No. .....

Victor Casassa,

Petitioner,

—against—

The State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

The petitioner Victor Casassa respectfully prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals affirming the judgment of conviction entered against petitioner by the County Court of Nassau County, New York.

Opinions Below

The opinion and order of the New York Court of Appeals, not yet reported, appears in the appendix hereto at page 1A. The order of the Appellate Division, Second Judicial Department, affirming petitioner's conviction without opinion, appears in the appendix at page 16a, and is reported in *People* v. *Casassa,* 411 N.Y.S.2d 478 (2d Dept. 1978).

Jurisdiction

The date of the judgment of the New York State Court of Appeals was April 1, 1980, which was also the date of entry. This Court's jurisdiction is invoked under Title 28, United States Code, §1257(3).

Question Presented

Whether petitioner's statements, made while in police custody, were obtained in violation of his Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination?

Constitutional Provisions Involved in the Case

The Fifth Amendment of the United States Constitution states as follows:

> "AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment of the United States Constitution states as follows:

> "AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury for the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his Defence."

Statement of the Case

On October 26th, 1977, Victor Casassa was found guilty, following a trial without jury, of one count of Murder in the Second Degree, the stabbing death of Victoria Lo Consolo, on February 28th, 1977.

The police discovered Ms. Lo Consolo's body in the early evening of March 1st, 1977. During an interview with another resident of the building, petitioner appeared at the superintendent's apartment and told a police detective that he had visited the deceased on the previous night. He then accompanied three officers to his apartment where he was questioned about his relationship with Ms. Lo Consolo.

Petitioner subsequently consented to go to police headquarters to discuss the matter further. During the ride to the precinct in the patrol car, a detective advised petitioner of his *Miranda* rights. Petitioner stated that he wished to cooperate. Petitioner was interrogated by the police for some nine and one-half hours thereafter and

at 5:00 A.M. the next morning, he gave oral and written confessions to his involvement in the crime.

The following portrait of petitioner emerged from the testimony of Dr. Daniel W. Schwartz, a psychiatrist who testified at trial on petitioner's behalf. A pathologically shy and lonely twenty-six-year-old, petitioner became deeply attracted to Vicky Lo Consolo. When Ms. Lo Consolo accepted his first invitation for a date, petitioner was elated. They dated casually for a while, but eventually Ms. Lo Consolo told petitioner that she was not "falling in love" with him. This admission devastated him and he felt emotionally destroyed.

Petitioner then embarked upon a number of increasingly desperate attempts to win Vicky Lo Consolo's love, to no avail. His mounting anxiety and distress over her rejection culminated in a series of irrational acts prior to the actual stabbing, which included breaking into her apartment while she was away, undressing and attempting to sleep in her bed. Dr. Schwartz testified that in his professional opinion, petitioner was acting under the influence of "extreme emotional disturbance" pursuant to New York Penal Law §125.25(1)(a) when he killed Vicky Lo Consolo. The trial court rejected petitioner's assertion of this affirmative defense.

REASONS FOR GRANTING THE WRIT

The Correctness of the Decision Below Is Open to Serious Question

It is well-settled that extra-judicial confessions, involuntarily made, are inadmissible against an accused. *Blackburn* v. *Alabama,* 361 U.S. 199 (1960). Courts have uniformly applied the "totality of the circumstances" test to determine voluntariness. *Fikes* v. *Alabama,* 352 U.S. 191 (1957).

In reviewing the totality of the circumstances in the case at bar, it is extremely pertinent that petitioner had never before been arrested. A complete stranger to police stations and law-enforcement procedure, he suddenly found himself the subject of an all-night interrogation conducted by numerous armed detectives and police officers. Surely, this withdrawn, pathologically shy and disturbed man, cut off from family and friends, deprived of sleep throughout the night after working an eight-hour day, taking no nourishment except coffee, and questioned at frequent intervals over a ten-hour period, cannot be said to have "voluntarily" made the incriminating statements at issue. In addition, his impaired mental condition severely crippled his capacity for self-determination despite the giving of *Miranda* warnings and rendered his statements involuntary as a matter of law. Accordingly, the New York Court of Appeals erred in upholding the trial court's denial of suppression.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New York State Court of Appeals.

Respectfully submitted,

RONALD P. FISCHETTI
Counsel for Petitioner
1290 Avenue of the Americas
New York, New York 10104
212/586-3732

ANNE C. FEIGUS
On the Brief

June 25, 1980

APPENDIX

APPENDIX

Opinion

This opinion is uncorrected and subject to revision before publication in the New York Reports.

STATE OF NEW YORK

COURT OF APPEALS

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2 No. 72

The People &c.,

Respondent,

vs.

Victor Casassa,

Appellant.

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(72) Anne Feigus & Ronald Fischetti, NY City, for appellant.

Denis Dillon, DA, Nassau County (Judith R. Sternberg & William C. Donnino of counsel) for respondent.

JASEN, J:

The significant issue on this appeal is whether the defendant, in a murder prosecution, established the affirmative defense of "extreme emotional disturbance" which would have reduced the crime to manslaughter in the first degree.

On February 28, 1977, Victoria LoConsolo was brutally murdered. Defendant Victor Casassa and Miss LoConsolo had been acquainted for some time prior to the latter's

tragic death. They met in August 1976 as a result of their residence in the same apartment complex. Shortly thereafter, defendant asked Miss LoConsolo to accompany him to a social function and she agreed. The two apparently dated casually on other occasions until November 1976 when Miss LoConsolo informed defendant that she was not "falling in love" with him. Defendant claims that Miss LoConsolo's candid statement of her feelings "devastated him."

Miss LoConsolo's rejection of defendant's advances also precipitated a bizarre series of actions on the part of defendant which, he asserts, demonstrate the existence of extreme emotional disturbance upon which he predicates his affirmative defense. Defendant, aware that Miss LoConsolo maintained social relationships with others, broke into the apartment below Miss LoConsolo's on several occasions to eavesdrop. These eavesdropping sessions allegedly caused him to be under great emotional stress. Thereafter, on one occasion, he broke into Miss LoConsolo's apartment while she was out. Defendant took nothing, but, instead, observed the apartment, disrobed and lay for a time in Miss LoConsolo's bed. During this break-in, defendant was armed with a knife which, he later told police, he carried "because he knew that he was either going to hurt Victoria or Victoria was going to cause him to commit suicide."

Defendant's final visit to his victim's apartment occurred on February 28, 1977. Defendant brought several bottles of wine and liquor with him to offer as a gift. Upon Miss LoConsolo's rejection of this offering, defendant produced a steak knife which he had brought with him, stabbed Miss LoConsolo several times in the throat, dragged her body to the bathroom and submerged it in a bathtub full of water to "make sure she was dead."

Appendix

The following day the police investigation of Miss LoConsolo's death began. On the evening of March 1, 1977, Nassau County police detectives came to the apartment building in which the crime had occurred. They were in the process of questioning several of the residents of the building when defendant presented himself to the police and volunteered that he had been in the victim's apartment on the night of the murder. While denying any involvement in the murder of Miss LoConsolo, he professed a willingness to cooperate in the investigation.

The police accepted his offer of cooperation and requested that he accompany them to the Nassau County police headquarters in Mineola to discuss the matter further. On the way to Mineola, defendant was informed of his constitutional rights. He indicated that he understood his rights and that he nonetheless wished to cooperate. Defendant was interrogated by police for some 9½ hours thereafter and at 5:00 A.M. on the morning of March 2, 1977, he fully confessed to the murder of Victoria LoConsolo, giving the police several oral and written statements detailing his involvement in the crime.

During the course of defendant's interrogation, his mother, worried because her son had not appeared at a planned social gathering, telephoned the Hempstead police to report her son as a missing person. She made several calls to the Hempstead Police Department and at least one to Nassau County Police Department's seventh precinct in Manhasset between the hours of 11:00 P.M. on March 1, 1977 and 3:00 A.M. on March 2, 1977, and was informed by the officers at these stations that her son's whereabouts were unknown. She then telephoned the apartment of Victoria LoConsolo. The officer on duty there told her of the murder and gave her no further information, but said that

the police would return her call. At 4:00 A.M., having received no further information, she called the apartment again. This time another officer gave her a telephone number to call to seek further information about her son. A call to this number at 5:00 A.M. was also unavailing. However, a subsequent call to the Hempstead police yielded yet another number at the Nassau County Police Department. When Mrs. Casassa called this number, she was accurately informed that her son was held for questioning as a suspect in the LoConsolo homicide. Thereafter, she came to the station and arranged to have counsel provided for her son.

On March 8, 1977, defendant was indicted and charged with murder in the second degree. Defendant made several pretrial motions seeking to suppress his statements to police and several pieces of real evidence which had been given to police during questioning. After a hearing, the motions were denied.

Defendant waived a jury and proceeded to trial before the County Court. The minutes of the suppression hearing were incorporated into the trial transcript and defendant's confessions were received into evidence. The defendant did not contest the underlying facts of the crime. Instead, the sole issue presented to the trial court was whether the defendant, at the time of the killing, had acted under the influence of "extreme emotional disturbance". (Penal Law § 125.25[1][a].) The defense presented only one witness, a psychiatrist, who testified, in essence, that the defendant had become obsessed with Miss LoConsolo and that the course which their relationship had taken, combined with several personality attributes peculiar to defendant, caused him to be under the influence of extreme emotional disturbance at the time of the killing.

Appendix

In rebuttal, the People produced several witnesses. Among these witnesses was a psychiatrist who testified that although the defendant was emotionally disturbed, he was not under the influence of "extreme emotional disturbance" within the meaning of Penal Law section 125.25 (subd [1], par [a]) because his disturbed state was not the product of external factors but rather was "a stress he created from within himself, dealing mostly with a fantasy, a refusal to accept the reality of the situation."

The trial court in resolving this issue noted that the affirmative defense of extreme emotional disturbance may be based upon a series of events, rather than a single precipitating cause. In order to be entitled to the defense, the court held, a defendant must show that his reaction to such events was reasonable. In determining whether defendant's emotional reaction was reasonable, the court considered the appropriate test to be whether in the totality of the circumstances the finder of fact could understand how a person might have his reason overcome. Concluding that the test was not to be applied solely from the viewpoint of defendant, the court found that defendant's emotional reaction at the time of the commission of the crime was so peculiar to him that it could not be considered reasonable so as to reduce the conviction to manslaughter in the first degree. Accordingly, the trial court found defendant guilty of the crime of murder in the second degree. The Appellate Division affirmed, without opinion.

On this appeal defendant contends that the trial court erred in failing to afford him the benefit of the affirmative defense of "extreme emotional disturbance". It is argued that the defendant established that he suffered from a mental infirmity not arising to the level of insanity which disoriented his reason to the extent that his emotional re-

action, from his own subjective point of view, was supported by a reasonable explanation or excuse. Defendant asserts that by refusing to apply a wholly subjective standard the trial court misconstrued section 125.25 (subd [1], par [a]) of the Penal Law. We cannot agree.

Section 125.25 (subd [1], par [a]) of the Penal Law provides that it is an affirmative defense to the crime of murder in the second degree where "[t]he defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." This defense allows a defendant charged with the commission of acts which would otherwise constitute murder to demonstrate the existence of mitigating factors which indicate that, although he is not free from responsibility for his crime, he ought to be punished less severely by reducing the crime upon conviction to manslaughter in the first degree. (Penal Law § 125.25[1][a]; *People* v. *Patterson*, 39 NY2d 288, 302, affd sub nom. *Patterson* v. *New York*, 432 US 197; see also, Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L Rev 1425, 1446.)

In enacting section 125.25 (subd [1], par [a]) of the Penal Law, the legislature adopted the language of the manslaughter provisions of the Model Penal Code (see § 201.3, subd [1], par [b] Tent Draft No. 9]). The only substantial distinction between the New York statute and the Model Penal Code is the designation by the legislature of "extreme emotional disturbance" as an "affirmative defense", thus placing the burden of proof on this issue upon defendant. (Penal Law 25.00, subd [2]; *People* v. *Patterson*, 39 NY2d 288, 301, *supra.*) The Model Penal Code formulation, however, as enacted by the legislature, repre-

sented a significant departure from the prior law of this state.

The "extreme emotional disturbance" defense is an outgrowth of the "heat of passion" doctrine which had for some time been recognized by New York as a distinguishing factor between the crimes of manslaughter and murder. (See 1829 Rev Stat of New York, Part IV, ch I, tit II, §§ 10, 12, 18; L 1881, ch 676, §§ 189, subd [2], 193, subd [2]; Penal Law of 1909, § 1052, subd [2].) However, the new formulation is significantly broader in scope than the "heat of passion" doctrine which it replaced. (*People* v. *Patterson*, 39 NY2d 288, 302-303, *supra*; *People* v. *Shelton*, 28 Misc 2d 136, 141-142; Notes of the Staff of the State Commission on Revision of the Penal Law and Criminal Code, 1967 Gilbert, Criminal Law and Practice of New York, pp 1C-61-2; Model Penal Code, § 201.3, Comment, pp 46-47 (Tent Draft No. 9].)

For example, the "heat of passion" doctrine required that a defendant's action be undertaken as a response to some provocation which prevented him from reflecting upon his actions. (See, e.g., *People* v. *Ferraro,* 161 NY 365, 375.) Moreover, such reaction had to be immediate. The existence of a "cooling off" period completely negated any mitigating effect which the provocation might otherwise have had. (See, e.g., *People* v. *Fiorentino,* 197 NY 560, 563.) In *Patterson,* however, this court recognized that "[a]n action influenced by an extreme emotional disturbance is not one that is necessarily so spontaneously undertaken. Rather, it may be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore." (39 NY2d, at p. 303.) This distinction between the past and present law

of mitigation, enunciated in *Patterson,* was expressly adopted by the trial court and properly applied in this case.

The thrust of defendant's claim, however, concerns a question arising out of another perceived distinction between "heat of passion" and "extreme emotional disturbance" which was not directly addressed in *Patterson,* to wit: whether, assuming that the defense is applicable to a broader range of circumstances, the standard by which the reasonableness of defendant's emotional reaction is to be tested must be an entirely subjective one. Defendant relies principally upon our decision in *Patterson* and upon the language of the statute to support his claim that the reasonableness of his "explanation or excuse" should be determined solely with reference to his own subjective viewpoint. Such reliance is misplaced.

In *Patterson,* this court was concerned with the question of whether the defendant could properly be charged with the burden of proving the affirmative defense of "extreme emotional disturbance". In deciding that the defendant could constitutionally be required to carry such a burden, we noted that "[t]he purpose of the extreme emotional disturbance defense is to permit the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity, and that he is less culpable for having committed them." (39 NY2d, at p. 302.) We also noted that "[t]he differences between the present New York statute and its predecessor * * * can be explained by the tremendous advances made in psychology since 1881 and a willingness on the part of the courts, legislators, and the public to reduce the level of responsibility imposed on those whose capacity has been diminished by mental trauma." (*Id.,* at p. 303.) These comments,

however, were relevant to our decision only insofar as they demonstrated that the affirmative defense of "extreme emotional disturbance" is a mitigating factor which the defendant must prove as opposed to a substantive element of the crime of murder which the People must prove.

Defendant, however, would read *Patterson* as holding that all mental infirmity, short of insanity, must constitute "extreme emotional disturbance" if such infirmity causes the defendant to become emotionally disturbed and the defendant subjectively believed his disturbance had a reasonable explanation or excuse. While it is true that the Court in *Patterson* recognized that "extreme emotional disturbance" as contemplated by the statute is a lesser form of mental infirmity than insanity,[1] the court did not hold that all mental infirmities not arising to the level of insanity constitute "extreme emotional disturbance" within the meaning of the statute. This question was not presented to us in *Patterson* and we did not decide it. Defendant's attempt to further extend our holding in *Patterson* to support the proposition that the reasonableness of the explanation or excuse for defendant's emotional disturbance must be tested from the subjective viewpoint of defendant is completely unavailing, for that case had nothing whatever to do with this issue.

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[1] Defendant also notes that the People's expert witness stated that a mental disease not arising to the level of insanity could not be considered to be "extreme emotional disturbance" within the meaning of the statute. Of course, to the extent that the witness' comments can be interpreted as being in conflict with our decision in *Patterson*, the witness is in error. However, the trial court did not fully adopt this view and, in fact, predicated its decision upon a finding that the emotional disturbance which defendant experienced had no reasonable explanation or excuse. We would note that the trial court could have completely disregarded the witness' testimony and still have denied the defendant the benefit of the defense. (*People* v. *Solari*, 43 AD2d 610, 612, affd 35 NY2d 876.)

Appendix

Having determined that our decision in *Patterson* does not require that reasonableness be tested with a completely subjective standard, we must now determine whether the language of the statute or the legislative history of the statute indicates that such a standard is required.

Section 125.25 (subd [1], par [a]) of the Penal Law states it is an affirmative defense to the crime of murder that "[t]he defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." Whether the language of this statute requires a completely subjective evaluation of reasonableness is a question that has never been decided by this court, although it has been raised in our lower courts with diverse results. (Compare *People* v. *Shelton*, 88 Misc 2d 136, *supra*, with *People* v. *Lyttle*, 95 Misc 2d 879, 884.) Moreover, although several states have enacted identical or substantially similar statutes (see Conn. GSA, §§ 53a-54, subd [a], par [1]; Del. Code Ann, Tit 11, § 641; Hawaii Penal Code, § 702, subd [2]; Ky. Rev. Stat, § 507-020, subd [1], par [a]; Rev. Codes of Mont., 94-5-103; N. Dak. Century Code, § 12.1-16-02; Ore. Rev Stat, § 163.115; Utah Code Ann, § 76-5-205), only one decision of the highest court of any of our sister states which has addressed this question has been called to our attention (*State* v. *Elliott*, —— Conn. —— [decided March 6, 1979]) and that court expressly followed Justice Bentley Kassal's well-reasoned opinion in *People* v. *Shelton* (88 Misc 2d 136, *supra*).

Consideration of the Comments to the Model Penal Code, from which the New York statute was drawn, are instruc-

tive. (Model Penal Code, § 201.3, Comment [Tent. Draft No. 9 (1959)].) The defense of "extreme emotional disturbance" has two principal components—(1) the particular defendant must have "acted under the influence of extreme emotional disturbance", and (2) there must have been "a reasonable explanation or excuse" for such extreme emotional disturbance, "the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be". The first requirement is wholly subjective—i.e., it involves a determination that the particular defendant did in fact act under extreme emotional disturbance, that the claimed explanation as to the cause of his action is not contrived or sham.

The second component is more difficult to describe—i.e., whether there was a reasonable explanation or excuse for the emotional disturbance. It was designed to sweep away "the rigid rules that have developed with respect to the sufficiency of particular types of provocation, such as the rule that words alone can never be enough" (*id*, at pp 46-47), and "avoids a merely arbitrary limitation on the nature of the antecedent circumstances that may justify a mitigation" (*id*). "The ultimate test, however, is objective; there must be 'reasonable' explanation or excuse for the actor's disturbance" (*id*, at p 41). In light of these comments and the necessity of articulating the defense in terms comprehensible to jurors, we conclude that the determination whether there was reasonable explanation or excuse for a particular emotional disturbance is to be made by viewing the subjective, internal situation in which the defendant found himself and the external circumstances as he perceived them at the time, however inaccurate that perception may have been, and assessing from that stand-

point whether the explanation or excuse for his emotional disturbance was reasonable, so as to entitle him to a reduction of the crime charged from murder in the second degree to manslaughter in the first degree.[2] We recognize that even such a description of the defense provides no precise guidelines and necessarily leaves room for the exercise of judgmental evaluation by the jury. This, however, appears to have been the intent of the draftsmen. "The purpose was explicitly to give full scope to what amounts to a plea in mitigation based upon a mental or emotional trauma of significant dimensions, with the jury asked to show whatever empathy it can." (Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L Rev 1425, 1446, *supra*.)

By suggesting a standard of evaluation which contains both subjective and objective elements, we believe that the drafters of the code adequately achieved their dual goals of broadening the "heat of passion" doctrine to apply to a wid r range of circumstances while retaining some element of objectivity in the process. The result of their draftsmanship is a statute which offers the defendant a fair opportunity to seek mitigation without requiring that the trier of fact find mitigation in each case where an emotional disturbance is shown—or as the drafters put it, to offer "room for argument as to the reasonableness of the explanations or excuses offered."

We note also that this interpretation comports with what has long been recognized as the underlying purpose of any mitigation statute. In the words of Mr. Justice Car-

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[2] We emphasize that this test is to be applied to determine whether defendant's emotional disturbance, and not the act of killing, was supported by a reasonable explanation or excuse.

dozo, referring to an earlier statute: "What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistably for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words." (Cardozo, Law and Literature, pp 100-101.) In the end, we believe that what the legislature intended in enacting the statute was to allow the finder of fact the discretionary power to mitigate the penalty when presented with a situation which, under the circumstances, appears to them to have caused an understandable weakness in one of their fellows. Perhaps the chief virtue of the statute is that it allows such discretion without engaging in a detailed explanation of individual circumstances in which the statute would apply, thus avoiding the "mystifying cloud of words" which Mr. Justice Cardozo abhorred.

We conclude that the trial court, in this case, properly applied the statute. The court apparently accepted, as a factual matter, that defendant killed Miss LoConsolo while under the influence of "extreme emotional disturbance", a threshold question which must be answered in the affirmative before any test of reasonableness is required. The court, however, also recognized that in exercising its function as trier of fact, it must make a further inquiry into the reasonableness of that disturbance. In this regard, the court considered each of the mitigating factors put forward by defendant, including his claimed mental disability, but found that the excuse offered by defendant was so peculiar to him that it was unworthy of mitigation. The court obviously made a sincere effort to understand defendant's "situation" and "the circumstances as defen-

dant believed them to be", but concluded that the murder in this case was the result of defendant's malevolence rather than an understandable human response deserving of mercy. We cannot say, as a matter of law, that the court erred in so concluding. Indeed, to do so would subvert the purpose of the statute.

In our opinion, this statute would not require that the jury or the court as trier of fact find mitigation on any particular set of facts, but, rather, allows the finder of fact the opportunity to do so, such opportunity being conditional only upon a finding of extreme emotional disturbance in the first instance. In essence, the statute requires mitigation to be afforded an emotionally disturbed defendant only when the trier of fact, after considering a broad range of mitigating circumstances, believes that such leniency is justified. Since the trier of fact found that defendant failed to establish that he was acting "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse", defendant's conviction of murder in the second degree should not be reduced to the crime of manslaughter in the first degree.

Defendant also urges in support of reversal that the confessions upon which his conviction was predicated were involuntarily given to the police. However, the trial court examined "totality of the circumstances" of defendant's arrest and subsequent confession (see *People* v. *Anderson*, 42 NY2d 35, 38) and found, as a factual matter, that defendant's oral and written statements were given to the police voluntarily. The Appellate Division affirmed this finding. Having carefully examined the record, we find nothing in the circumstances of this case which would lead us to conclude that defendant's confession was involuntarily obtained as a matter of law.

Finally, defendant contends that his mother's unsuccessful effort to contact him, aggravated in part by an apparently accidental dissemination of misinformation by the police,[3] denied defendant his right to counsel. While it is true that when an attorney attempts to intercede in a criminal defendant's behalf and is prevented from doing so by police misinformation, that defendant's right to counsel is infringed (see, e.g., *People* v. *Garofolo*, 46 NY2d 592, 600-601), no such infringement is present where, as here, a family member contacts police to report that her son was a "missing person". Nor is there any evidence in the record to suggest that this is a case such as *People* v. *Bevilacqua* (45 NY2d 508), where the record supported the inference that the police intentionally deprived the defendant of access to his family in an effort to obtain a confession. It is clear from the record that the defendant, a man of 27 years, consciously chose to confront his interrogators alone. Indeed, it is undisputed that defendant, after being informed of his constitutional rights, did not ever ask to speak with either counsel or any member of his family. Under these circumstances, we cannot say that defendant's right to counsel has been infringed.

We have examined defendant's remaining contentions and find them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed.

* * *

Order affirmed. Opinion by Jasen, J. All concur.

Decided April 1, 1980

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[3] We are informed that the Nassau County police have instituted a system for monitoring the whereabouts of all people in their custody, which should help to avoid the possibility that such misinformation will be given out in the future.

Order on Appeal from Judgment of Conviction

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 26, 1978.

HON. VITO J. TITONE, *Justice Presiding,*
HON. JOSEPH A. SUOZZI,
HON. FRANK A. GULOTTA,
HON. J. IRWIN SHAPIRO,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

VICTOR CASASSA,
Appellant.

In the above entitled action, the above named Victor Casassa, defendant in this action, having appealed to this court from a judgment of the County Court, Nassau County, rendered December 1, 1977; and the said appeal having been argued by Gerald P. Schargel, Esq., of counsel for the appellant, and argued by Judith K. Rubinstein, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

Clerk of the Appellate Division